Testimony SB 361

- Madam Chair – members of the committee
- I am Paul Stahl – I am a Deputy Lewis & Clark County Attorney.
- I am a bit uncomfortable appearing here today. I was raised on a sheep and cattle ranch and farm in southwestern Montana – a ranch my family owned for close to 100 years.
- Many, if not all, who oppose this amendment will claim that ranchers and the agricultural community are struggling. I understand the difficulties in making a living as a rancher because we lost our ranch in 1986.
- Many who oppose this amendment will tell you that the purpose of the heavily weighted vote is because agricultural landowners with large acreage have more land affected by the zoning, and therefore, should have more voting power. (That argument is political, not legal.)
- This is NOT an attack on agricultural landowners who own large acreage. Rather, this amendment is in defense of other citizens - the landowner who owns small acreage, the businessman/woman, and the non-landowner - who are disenfranchised by the present law.
- I do not understand why large landowners should be afforded greater voting power than smaller landowners, business men/women, and non-landowners when the election concerns issues of public health and safety for all.
- I do not understand why a landowner with 10,000 acres or 1000 acres or 200 acres has significantly more voting power than a residential landowner when it comes to issues affecting the public health and safety of all citizens.
- My question to you is whether this "discrimination," this "favoring" of one citizen over another, has a compelling governmental interest?
- I have prepared a handout for discussion purposes. I have given a copy of the handout and a copy of my comments to the committee secretary.
- If you will allow, let me establish a hypothetical case.

- Imagine looking from the steps in front of the capitol building out into the Helena Valley.
- Imagine that Lewis and Clark County wishes to establish a zoning district in the valley regulating the size of lots, regulating the types of septic systems needed to protect the groundwater used by the residents for drinking water, regulating setbacks for fire protection, and regulating dust and smoke to prevent air pollution exacerbated by the inversions in the valley.
- To adopt a zoning district, a city or county must follow certain statutory procedures, including adopting a resolution and then giving landowners the right to protest.
- The part of that procedure at issue today is found in MCA 76-2-205(6), which establishes the protest procedure. (see page 2, lines 3-5 of this bill).

- I f you will, please refer to the handout I have provided.
- The first page is pie chart that hypothetically represents the acreage within the proposed zoning district. The green portion represents 70,000 acres of agricultural land comprised of parcels designated as agricultural by the Department of Revenue. The red portion represents 20,000 acres of land designated as non-agricultural. This non-agricultural land is comprised of residential parcels, commercial parcels, and 20-acre or less hobby parcels.
- Included among the agricultural freeholders are four ranchers, each owning a spread of 10,000 acres. Each has three family members. Their acreage is labeled on the chart as A, B, C, and D, and is represented by the crosshatched green. The remainder of the agricultural land is represented on the chart in green and is made up of many smaller spreads ranging from 200 acres to 4000 acres.
- Please turn to the second page. This pie chart hypothetically represents the population within the proposed zoning district. Within the proposed district live 14,000 people -- 1000 agricultural freeholders (a freeholder is a real property owner who pays taxes), 11,000 non-agricultural freeholders

(freeholders who do not own agricultural land but pay taxes at a much, much higher rate than agricultural freeholders), 100 business freeholders (freeholders who do not own agricultural land but who own convenience stores, mechanic shops, and restaurants), and 1900 non-freeholders who rent homes or businesses.

- Under current law (see page 2, lines 8-10), the 4 large freeholders on the chart can, by filing protests, prevent the creation of the zoning district because the acreage of their land totals 57% of the total agricultural land (50% protest is all that is required by the statute to prevent the regulations from being implemented [see page 2, lines 8-10]).
- Please compare the number of residents to the acreage. The thin black line represents the four landowners who own 10,000 acres apiece; the green represents other agricultural landowners; the blue, green and yellow represent citizens who are disenfranchised by the present statute.
- The statutory scheme allowing owners of large agricultural parcel to have a heavily weighted vote does not have any relationship to the number of people affected by contaminated groundwater, fires, and air pollution.
- This statutory scheme does not have any relationship to business freeholders such as owners of motels, grocery stores, and mechanic shops, whose customers and workers use the groundwater for drinking, breath the polluted air, and are in need of fire protection.
- This statutory scheme does not have any relationship to those residents of the district who are not freeholders, but who reside in apartment houses or trailer parks other rental units and who must use the groundwater for drinking, need fire protection, and breathe polluted air.
- `This statutory scheme has no relationship to the number of registered voters or the number of residents or any other constitutionally permissible criteria.
- How much land one owns –and the more the better – is the only criteria.
- In the hypothetical illustrated by the handout, the statutory formula disenfranchises 996 agricultural freeholders, 11,000 non-agricultural

freeholders, 100 business freeholders, and 1900 non-freeholders. The four landowners and their families who own the 10,000-acre spreads comprise only .001% of the number of residents of the district.

- Lawyers deal with the Constitution on a daily basis. When I was an adjunct professor teaching Constitutional Law at Carroll College, I always, in the first class of the semester, asked the students what form of government existed in this state and country. Invariably they responded "a democracy."
- I then told them that I thought their answer was only partially correct – that we lived in a CONSTITUTIONAL democracy.
- In a pure democracy, the majority always wins.
- In a CONSTITUTIONAL democracy the majority doesn't always win, because when the third equal branch of government - the Court - reviews legislation passed by a majority of lawmakers, the Court has a **duty** to determine whether the legislation violates any Constitutional provision. If the legislation does violate the Constitution, the Court has no alternative other than to declare the legislation and statute null and void.
- "Due process" and "equal protection" are the pillars of our Constitution. Equal protection has been defined as "a fundamental fairness."
- Built on top of these two pillars are fundamental rights. The right to vote is a fundamental right. The right to vote is not absolute (neither is the right to bear arms, the right to a jury trial, the right of free speech), but if the government decides to curtail or limit a fundamental right – in this instance, the right to vote, there must be some constitutionally permissive, legally compelling reason.
    - The government must have some compelling governmental purpose to deny non-freeholders the right to vote on public health and safety issues.
    - The government must have some compelling governmental purpose to dilute the right of non-agricultural freeholders to vote on public health and safety issues.

- MCA section 76-2-205, originally adopted in 1963, restricts voting to landowners only. The 1995 amendment to 76-2-205, to the detriment of other citizens living in the district, enhances the voting power of landowners owning large agricultural parcels.
- The existing statute creates a three-tiered voting scheme of citizens residing in the zoning district without any apparent compelling reason.
- The existing statute dilutes the voting rights of landowners owning smaller parcels not taxed for agricultural/forestland purposes.
- This existing statute denies the voting rights of non-freeholder residents.
- Such a distinction between landowners, non-landowners, and agricultural/forest landowners serves no compelling governmental purpose. Consequently, the protest procedure in §76-2-205 works an insidious discrimination and violates the equal protection clauses of the Montana and United States constitutions. (It is true that property is treated differently for purposes of taxation, but that discrimination does not necessarily affect a fundamental Constitutional right, nor does tax legislation necessarily affect public health and safety.)
- Imagine again with me a time, not so distant in the past, when in order to vote for or against a mill levy supporting schools, the voter had to be white and male and pay a poll tax. The U.S. Supreme Court struck down those requirements because they violated the equal protection clause of U.S. Constitution.
- Now, fast forward to a more recent time when voting in a school election was limited to freeholders only. The U.S. Supreme Court struck that requirement also, because it violates equal protection, despite the argument that freeholders only should be allowed to vote because they pay the taxes and are therefore more affected than other citizens. The Court held that the passage or defeat of tax levies affects more than landowners.
- The U.S. Supreme Court has held that a limitation on the right to vote based on property ownership is unconstitutional discrimination.

- In *Kramer* a New York education law limited voting in school district elections to owners of taxable property and to parents of children enrolled in public schools. The Court invalidated the law, holding that excluded residents, otherwise eligible to vote, had a "distinct and direct interest" in school district decisions.
- In *Kramer* the Court held that limiting the right to vote on the issuance of revenue bonds to property owners only, violated the equal protection clause of the 14th Amendment because "the benefits and burdens of the bond issue fall indiscriminately on property owner and non-property owner alike," and the law excluded "otherwise qualified voters who are as substantially affected and directly interested...as are those who are permitted to vote."
- In *Kramer* the Court held that even if the bonds were paid for solely by property tax revenues, this would not mean property owners were substantially more interested in the election, because a significant part of taxes on rental property are borne by tenants rather than landlords, and taxes on commercial property are passed on to consumers, including non-property owners, in the form of higher prices.

- The amendment before you today is about equal protection for all citizens: rich or poor, landowners or non-landowners, ranchers or renters, homeowners or businessmen/women. The amendment before you today is about fundamental fairness. Citizens other than a landowner with large acreage, including renters, businessmen/women, and children – are all affected by contaminated groundwater, fires, and air pollution.
- ? Is it fundamentally fair that a freeholder with large acreage has significantly more voting power than a freeholder with lesser acreage?
- ? Is it fundamentally fair that an agricultural freeholder has significantly more voting power than a residential freeholder?

- ? Is it fundamentally fair that a freeholder with large acreage has control over groundwater contamination and air pollution and fire protection when those issues affect all residents, not just the freeholders?
- I do not understand why renters and/or leaseholders do not have any right to vote when it comes to the air they breathe or the water they drink.
- If a landowner with large acreage has a spouse and three children, how is that family impacted more on these health and safety issues than the landowner of a 1-acre parcel, or a renter who has a spouse and three children?
- I do not think one has to be a lawyer to understand that without the proposed amendment, there is something fundamentally unfair about a law that gives voting power based upon how much agricultural land is owned.
- The amendment before you today purposes that agricultural landowners owning large acreage and agricultural landowners owning lesser acreage and business landowners and residential landowners and those who own no land at all, and who register to vote, have the same/equitable power when it comes to issues of public health and safety.
- I understand that legislature's chief legal counsel, if asked, will give an opinion that the existing statute has constitutional problems. (See also: Report to 60th Legislature on House Joint Resolution No. 10 - Study of Wildland Fire Policy and Statutes, dated October 2006, pages 10-11, appendix B, and pages 77-90. Within those pages are rationale for this amendment and also proposed legislation - LC 2003 – that revises fire district regulations limiting voting to freeholders only.) (Please also note the members of the Environmental Quality Council who approved this proposed legislation and it elimination of the freeholder requirement to vote.)
- As further authority, in 2003 the Montana Supreme Court decided a case known as *Finke v. State.* In paragraph 21 of the opinion, the Court concluded:

- "First, we conclude that the application and enforcement of building codes is an ***issue of public safety that affects all persons living in the affected area, not only record owners of real property.*** **[A]** ***law restricting the franchise [the right to vote] may be upheld only upon the State showing a compelling interest.*** The State has failed to make such a showing in this case."
    - (NOTE: Senator McGee filed an amicus brief in this case wherein he agreed that limiting the right to vote to record owners of real property was unconstitutional. [*See* paragraph 13]).
- I would encourage this committee and this legislature to fix this fundamental unfairness – this violation of equal protection.
- If you do not, some "activist" judge will have no choice other than to declare the statute is unconstitutional.
- You all took an oath to uphold that law. I think there is irrefutable legal authority that the statute without the amendment is unconstitutional. I think YOU – this legislature – this branch of government - has a fiduciary duty to fix the statute and not to defer the tough decision to an "activist" judge.
- We are a nation of laws, and the rule of law is primary. For those living in emerging democracies and those living in nations with other forms of government, the single most admired asset of this country and this state is the Rule of Law.
- The Constitution is the overarching law for everything this legislature does. This statute, without the amendment, violates that law.
- As a side note, I think any lawyer who testifies on this amendment who disagrees with the fundamental fairness of the existing statute is expressing a political opinion. Any lawyer who offers a legal opinion that 76-2-205 is presently constitutional is being disingenuous at best.
- I would also suggest that this committee make this amendment effective upon passage. Unlike much of what you do, this bill corrects an unlawful

statute. It should be removed from the Montana Codes as soon as possible.

- I encourage you to vote "DO PASS" on the amendment. I would also urge you to make the statute effective upon passage.

* *

Related Legal References

- The fundamental right to vote enjoys specific protection in the Montana Constitution:
    - Requiring persons to be "record owners of real property" in order to vote on a building code issue is unconstitutional. *Finke v. State ex rel. McGrath*, 65 P.3d 576 (Mont. 2003). (NOTE: Senator McGee filed an amicus brief in this case wherein he agreed that limiting the right to vote to record owners of real property was unconstitutional. [*See* paragraph 13])
    - In paragraph 21 of the opinion, the Court concluded:

> "First, we conclude that the application and enforcement of building codes is an ***issue of public safety that affects all persons living in the affected area, not only record owners of real property.*** Second, the governmental entity overseeing building codes, whether state, county or municipal, is not such a special-purpose unit that its functions and actions exclusively or disproportionately affect record owners of real property over other constituents living in the area but not owning property. Third, we conclude that elections to determine who may impose and enforce building codes in a given area are general interest rather than special interest elections. This being so, ***a law restricting the franchise [the right to vote] may be upheld only upon the State showing a compelling interest.*** The State has failed to make such a showing in this case."

- Montana Constitutional provision limiting certain votes to taxpayers is invalid; *State ex rel. Ward v. Anderson*, 491 P.2d 868, 870 (Mont. 1971).

- The right to vote enjoys specific protections in the federal constitution:
  - The Fifteenth Amendment prohibits limiting the right to vote based on race, color, or previous condition of servitude.
  - The Nineteenth Amendment extends the right to vote to women and prohibits limiting the right based on a resident's sex.
  - The Twenty-fourth Amendment prohibits the use of poll taxes or other taxes in elections for President, Vice President, federal Senators, and federal Representatives.
  - The Twenty-sixth Amendment extends the right to vote to all citizens 18 or older and further prohibits limiting that right because on old age.
- The United States Supreme Court has a long history of declaring limitations on the right to vote unconstitutional:
  - "The concept of political equality ... can mean only one thing - one person, one vote;"
  - "A legislative apportionment plan that violates the one person, one vote principle is not redeemed because it was approved by a popular referendum;"
  - "Limiting the vote of military servicemen based upon residence is unconstitutional;"
  - "Requiring a poll tax is unconstitutional because it is discrimination based on wealth;"
  - "Preventing residents who neither own nor lease property from voting on tax levies affecting schools is unconstitutional;"
  - "Allowing only property owners to vote on bond measures is unconstitutional;"
  - "Requiring school board trustees to be property owners is unconstitutional."

- The U. S. Supreme Court has explained that the right to vote is a "fundamental political right," because it is "preservative of all rights." "[T]he right to vote freely is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." "[N]o right is more precious in a free country," and "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."
- The U. S. Supreme Court has protected the right to vote from dilution as well as from complete denial because "[t]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.
- The U. S. Supreme Court has held that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." The Court further explained, "Voter qualifications have no relation to wealth nor to paying or not paying this [poll tax] or any other tax."
- The question remains: why are some people, in this instance those agricultural landowners owning large acreage, somehow "entitled" to special treatment. Whatever the reason, under the law and the Constitution, that reason must be compelling, because the statute infringes on a fundamental constitutional right, that being the right to vote.
- I encourage you to vote "DO PASS" on the amendment. I also think this bill should have an immediate effective date.

Attachments:

- Two pie charts illustrating the hypothetical zoning district;
- A copy of *Finke v. State ex rel. McGrath*, 65 P.3d 576 (Mont. 2003).
- Legal Memorandum – Limiting protests in elections to property owners

Exhibit Number: 1

This exhibit is:
No. 01-815
In the Supreme Court of the State of Montana Legislature 2003 MT 48 and other documents to numerous to scan. The first 10 pages are scanned to aid in your research. The originals can be viewed at the Montana Historical Society.

Montana Historical Society
Archives
225 N. Roberts
Helena MT 59620-1201
Phone (406) 444-4774

No. 01-815

IN THE SUPREME COURT OF THE STATE OF MONTANA

2003 MT 48

KAREN FINKE, ANDY J. HUDAK, SCOTT POWERS, CITY OF BILLINGS, CITY OF BOZEMAN, CITY OF COLUMBIA FALLS, CITY OF KALISPELL, CITY OF MISSOULA, CITY OF WHITEFISH,

Plaintiffs,

v.

STATE OF MONTANA, ex rel. MIKE McGRATH, ATTORNEY GENERAL and WENDY KEATING, ACTING DIRECTOR, MONTANA DEPARTMENT OF LABOR AND INDUSTRY, YELLOWSTONE COUNTY, GALLATIN COUNTY, FLATHEAD COUNTY, and MISSOULA COUNTY,

Defendants,

RICHARD ROSSIGNOL and R. STEPHEN WHITE,

Intervenors-Defendants,

DANIEL W. "DAN" McGEE and BRUCE T. SIMON,

Amici Curiae-Defendants.

APPEAL FROM: In the Supreme Court of the State of Montana
Original Proceeding--Declaratory and Injunctive Relief
In and for the County of Yellowstone

COUNSEL OF RECORD:

For Plaintiffs:

Stanley T. Kaleczyc, Kimberly A. Beatty, Browning, Kaleczyc, Berry & Hoven, Helena, Montana

For Defendants:

Mike McGrath, Montana Attorney General, Brian M. Morris, Solicitor, Helena, Montana; Eric Fehlig, Montana Department of Labor, Helena, Montana; Dennis Paxinos, Yellowstone County Attorney, Mark A. English, Deputy Yellowstone County Attorney, Billings, Montana; Marty Lambert, Gallatin County Attorney, Bozeman, Montana; Edward J. Corrigan, Flathead County Attorney, Jonathan B. Smith, Deputy Flathead County Attorney, Kalispell, Montana; Fred Van Valkenburg, Missoula County Attorney, Missoula, Montana; Stephanie Oblander, Gregory G. Smith, Smith & Oblander, Great Falls, Montana (Intervenors Rossignol & White)

For Amicus:

Daniel McGee, Laurel, Montana (*pro se*); Bruce Simon, Billings, Montana (*pro se*)

Heard: May 30, 2002
Submitted: June 6, 2002
Decided: March 18, 2003

Filed:

Clerk

Justice Patricia O. Cotter delivered the Opinion of the Court.

¶1 This is an original proceeding in which three individual electors and six municipal governments seek a declaratory judgment on the constitutionalit y of Senate Bill 242 (SB 242). We strike SB 242 in its entirety for the reasons set forth below.

ISSUES

¶2 Restated, the issues presented to this Court are:

1. Whether the election provisions of SB 242 limiting participation to "record owners of real property" are unconstitutional ;

2. Whether the unconstitutional provisions are severable from the constitutional provisions of SB 242; and

3. Whether Plaintiffs are entitled to recover attorneys' fees and costs under the Private Attorney General Doctrine.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Since 1966, Montana law has authorized Montana cities and towns to exercise building code jurisdiction over contiguous areas within four and one-half miles of the city limits. Section 69-2105, RCM (1947). This four and one-half mile area became known as the "donut area" or "donut jurisdiction." To obtain donut jurisdiction, an interested municipality must request, in writing, authorization from the applicable state agency, currently the Department of Commerce. Once granted, the municipality may then impose and enforce municipal building codes on construction that takes place in the donut area. Section 50-60-101(11), MCA (1999).

¶4 In the 2001 Montana Legislative Session, the Legislature enacted and the Governor

signed into law SB 242. The purpose of SB 242 was to limit municipal building code jurisdiction to the area within the limits of an incorporated city or town, and to allow the county or state--as opposed to the city--to exercise building code jurisdiction over all areas outside the municipal boundaries. To effectuate this outcome, Section 2 of SB 242 redefined "municipal jurisdictional area" to mean "the area within the limits of an incorporated municipality." "Municipal jurisdictional area" (MJA) had formerly been defined as the area within the limits of the incorporated municipality unless that area was extended by written request to include, among other things, "all or part of the area within 4 ½ miles of the corporate limits of a municipality." Section 50-60-101(11), MCA (1999). In other words, prior to SB 242, an MJA included all the area within the city limits plus the donut area. Section 2 of SB 242 eliminated from the definition the donut area.

¶5 SB 242 also established a definition for "county jurisdictional area" (CJA), which includes, "the entire county, or an area or areas within the county, designated by the board of county commissioners as subject to the county building code, excluding any area that is within the limits of an incorporated municipality." SB 242, § 2(6). Moreover, it established a procedure for designating a CJA either by the board of county commissioners or by petition. It also established an election procedure under which a CJA could be created. SB 242, §§ 4,7, and 6 respectively. According to the election procedure, elections were limited to "record owners of real property" (RORPs) rather than to the general constituency. SB 242, § 6.

¶6 In keeping with its purpose to eliminate MJAs, SB 242 established an election

procedure under which MJAs could be terminated. As with the election procedures to create CJAs, this termination election was limited to RORPs also. SB 242, § 8.

¶7 The individual Plaintiffs in this case are Karen Finke, Andy Hudak, and Scott Powers, none of whom own real property in their respective MJAs, but all of whom otherwise qualify as eligible voters. The municipal Plaintiffs are the cities of Billings, Bozeman, Columbia Falls, Kalispell, Missoula and Whitefish. Each of these cities previously sought and obtained authorization to create MJAs and to exercise building code jurisdiction over their respective donut areas. We will refer to the Plaintiffs as a group as "Finke." When necessary, we will refer to them as Individual Plaintiffs, meaning Finke, Hudak and Powers, or Municipal Plaintiffs, meaning the six cities listed above.

¶8 The Defendants in this action are the State of Montana, through the Attorney General, the Department of Labor and Industry (DOLI), and Yellowstone, Gallatin, Flathead and Missoula Counties. These County Defendants are the counties in which the Municipal Plaintiffs are located. The State, through the Attorney General, has the duty to defend the constitutionalit y of the statute. The DOLI is the state agency responsible for administering building codes outside of MJAs. The County Defendants are responsible for conducting the elections and other procedures mandated by SB 242 for determining whether the state, county or municipality will have jurisdiction over building codes.

¶9 In November, 2001, Finke filed a complaint challenging SB 242 and seeking 1) declaratory and injunctive relief; 2) a temporary restraining order; 3) a preliminary injunction; and 4) an expedited hearing. On November 20, 2001, this Court issued an Order

temporarily enjoining the County Defendants from passing any resolution under SB 242, conducting elections pursuant to SB 242, or enforcing any provision of SB 242. In addition, the DOLI was temporarily enjoined from asserting state building code jurisdiction within the donut areas of the Municipal Plaintiffs.

¶10 On December 18, 2001, we issued a preliminary injunction in favor of Municipal Plaintiffs, pending the outcome of the case on the merits. The previously-entered temporary injunctions against the County Defendants and DOLI continued as preliminary injunctions as a result of that Order. Additionally, we granted permission for Richard Rossignol and R. Stephen White to intervene. Rossignol and White are each in the construction industry in their respective donut areas of Missoula and Bozeman.

¶11 On February 12, 2002, we granted permission for Daniel W. McGee and Bruce T. Simon to participate as amici curiae. McGee and Simon are registered voters and taxpayers in Yellowstone County. Moreover, McGee was a sitting Montana representative and served as Speaker of the House during the legislative session in which SB 242 was enacted. Simon owns real property in the donut jurisdictional area of the City of Billings and also actively participated in the enactment of SB 242.

¶12 This Court heard oral argument on this matter on May 30, 2002.

DISCUSSION

¶13 The first issue we address is whether the election provisions of SB 242 limiting participation to RORPs are unconstitutional. Interestingly, not only do the Plaintiffs argue that these provisions are unconstitutional, but Defendant Yellowstone County and *Amici*

McGee and Simon also agree that these provisions are, in part or *in toto*, unconstitution al.

¶14 The election provisions of SB 242 are challenged on several constitutional grounds--as violations of Article II, §§ 4, 13 and 17 and Article V, § 11(3) of the Montana Constitution, and as violations of the Fifth and Fourteenth Amendments of the U. S. Constitution. Article II, § 4 of the Montana Constitution guarantees equal protection of the laws; Article II, § 13 guarantees the unencumbered right of suffrage, and Article II, § 17 guarantees due process of law. Article V, § 11(3) requires that each bill contain only one subject that is clearly expressed in its title. The Fifth and Fourteenth Amendments of the U.S. Constitution guarantee that no person shall be deprived of life, liberty or property without due process of law. Additionally, the Fourteenth Amendment guarantees all persons equal protection of the laws.

¶15 This Court has noted that "[b]ecause voting rights cases involve a fundamental political right, the [U. S.] Supreme Court generally evaluates state legislation apportioning representation and regulating voter qualifications under the strict scrutiny standard." *Johnson v. Killingsworth* (1995), 271 Mont. 1, 4. 894 P.2d 272, 273 (citing , *among others, Kramer v. Union School District* (1969), 395 U.S. 621, 626-27, 89 S.Ct. 1886, 1889, 23 L.Ed.2d 583, 589). "Under that standard, [suspect] legislation is ' **unconstitutional** unless the State can demonstrate that such laws are "necessary to promote a compelling governmental interest".'" *Johnson*, 241 Mont. at 4, 894 P.2d at 273-74 (citing *Dunn v. Blumstein* (1972), 405 U.S. 330, 342, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274, 284) (emphasis added).

¶16 In *Kramer*, the United States Supreme Court reviewed a law limiting the right to vote in school district elections to property owners or parents of children enrolled in the local public schools. In *Kramer*, appellant neither owned property nor had children but was otherwise qualified to vote, meeting the age, citizenship and residency requirements. Appellant challenged the law as a violation of the Equal Protection Clause of the U.S. Constitution. He argued that he and members of his class had a substantial interest in and were affected by school-related decisions and that all members of the community had an interest in the quality and structure of public education.

¶17 The U.S. Supreme Court, in its analysis, stated:

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged statute grants the right to vote to some [citizens] and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

Kramer, 365 U.S. at 626-27 (citation omitted).

¶18 The *Kramer* Court held that the challenged law did "not meet the exacting standard of precision . . . require[d] of statutes which selectively distribute the franchise." *Kramer*, 395 U.S. at 632. It held that the law permitted the inclusion of many persons who had only a remote and indirect interest in school affairs and excluded others who had a distinct and direct interest, and therefore violated the Fourteenth Amendment granting equal protection to all citizens. *Kramer*, 395 U.S. at 632 and 626. *See also Phoenix v. Kolodziejski* (1970), 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (restriction allowing only property owners to

vote for the approval of municipal general obligation bonds held unconstitutional); *Hill v. Stone* (1975), 421 U.S. 289, 95 S.Ct. 1637, 44 L.Ed.2d 172 (unconstitutiona l to limit franchise for bond election solely to owners of taxable property).

¶19 There are circumstances, however, under which franchise limitation is lawful and constitutional. This Court, taking its lead from the U.S. Supreme Court, has rec ognized "that, in the event of a special-purpose unit of government whose functions affect a distinct group of citizens more than other citizens, a state might be allowed to give greater influence to those citizens most affected." *Johnson*, 271 Mont. at 4, 894 P.2d at 274 (citing *Avery v. Midland County* (1968), 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45). This has been interpreted to allow franchise limitation in "special interest" elections as opposed to "general interest" elections. *Avery*, 390 U.S. 474; *Sayler Land Co. v. Tulare Water District* (1973), 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659; *Holt Civic Club v. Tuscaloosa*(1978), 439 U.S. 60, 69, 99 S.Ct. 383, 58 L.Ed.2d 292. Intervenors Rossignol and White argue, *inter alia*, that a determination of whether SB 242 elections are "special interest" or "general interest" elections requires a factual record that does not exist in this case since this is an original proceeding. Alternatively, they argue that SB 242 elections are "special interest" elections justifying limiting voters to RORPs. They assert that the Building Codes Division of the Montana DOLI is a special-purpose unit of the government and that the enforcement of building codes disproportionate ly affects property owners.

¶20 In a similar vein, the State argues that a franchise limitation such as that found in SB 242 does not necessarily violate equal protection principles. It maintains that under *Lockport*

v. Citizens for Community Action(1977), 430 U.S. 259, 97 S.Ct. 1047, 51 L.Ed.2d 313, the election provisions of SB 242 constitute limited referenda and, as a result, the Court must determine the extent to which genuine differences in the relevant interests of those enfranchised and those excluded supports the contested statutory voting classification. *Lockport*, 430 U.S. at 268. As did Intervenors, the State argues that this Court lacks sufficient facts, in the absence of a district court record, to evaluate whether the franchise limitation of SB 242 violates equal protection.

¶21 We disagree. First, we conclude that the application and enforcement of building codes is an issue of public safety that affects all persons living in the affected area, not only record owners of real property. Second, the governmental entity overseeing building codes, whether state, county or municipal, is not such a special-purpos e unit that its functions and actions exclusively or disproportion ately affect record owners of real property over other constituents living in the area but not owning property. Third, we conclude that elections to determine who may impose and enforce building codes in a given area are general interest rather than special interest elections. This being so, a law restricting the franchise may be upheld only upon the State showing a compelling interest. *Kramer*, 395 U.S. 621. The State has failed to make such a showing in this case.

¶22 In addition to the franchise limitations set forth in the election provisions of SB 242, there are numerous internal inconsistencies in this law. First, Section 8 establishes procedures pertinent to retaining and continuing municipal jurisdictional areas "as provided by law" under the statute. Section 2, however, completely eliminates "municipal

jurisdictional areas" by definition. It is inconsistent to provide that MJAs continue to exist by law when in the same law they have been eliminated. Second, the term "record owners of real property" is continuously used in SB 242 but is not defined, whereas "owner of real property" is also used. It is defined to include assignees, lessees and corporations in control of a building, *i.e.*, persons who are disenfranchised under this law because they are not record owners of property. While not unconstitutional *per se*, these and other inconsistencies create a muddled, confusing law which could potentially result in the denial of other constitutional guarantees, such as due process.

¶23 In sum, we conclude that the election provisions of SB 242 disenfranchise constituents who are not RORPs in violation of the Montana and the U.S. Constitutions.

¶24 We next consider whether the unconstitutional provisions of SB 242 are severable from the remainder of the Bill. If so, the constitutional portions of SB 242 survive; if not, the entire law must be stricken.

¶25 When a law contains both constitutional and unconstitutional provisions, to determine whether the unconstitutional provisions are severable, we examine the law itself for the existence of a severability clause. If there is no such clause, we must determine whether the unconstitutional provisions are necessary for the integrity of the law or were an inducement for its enactment. *Hill v. Rae* (1916), 52 Mont. 378, 389-90, 158 P. 826, 831; *State v. Fire Department Relief Association, etc.* (1960), 138 Mont. 172, 178, 355 P.2d 670, 673; *Sheehy v. Public Employees Retirement Div.* (1993), 262 Mont. 129, 141, 864 P.2d 762, 770.

¶26 This Court has previously held that the "inclusion of a severability clause is an